

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Wade W. Piccolo,

Petitioner,

FACT.

LAW

V.

RECOMMENDATION

Benton County,

Respondent.

FINDINGS OF

CONCLUSIONS OF

AND

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 27, 1994, at 9:30 a.m. at the City Council Chambers, City Hall, 251 Fourth Avenue, Foley, Minnesota.

Petitioner, Wade W. Piccolo, 909 Ninth Avenue, Foley, Minnesota 56329 appeared on his own behalf. Daniel A. Eller, Attorney at Law, 925 South First Street, P.O. Box 638, St. Cloud, Minnesota 56302 appeared on behalf of Respondent, Benton County. The record closed on this matter on April 27, 1994, upon the close of the hearing.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

STATEMENT OF ISSUE

Whether Petitioner's resignation from his position with Benton County constitutes a waiver of his rights under Minn. Stat. 197.46 (the Veterans Preference Act).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Wade W. Piccolo served on active duty in the U.S. Army from October 27, 1987, to September 12, 1990. Piccolo was separated from the service with an honorable discharge.

2. In August, 1992, Piccolo was hired by Benton County as a Deputy Sheriff. This position was probationary for a period of one year. Piccolo earned \$2,124 per month after six months with Benton County.

3. Frank F. Wippler is the Benton County Sheriff and was Piccolo's supervisor. Wippler expressed no complaints about Piccolo's performance until July, 1993.

4. On July 27, 1993, Piccolo met with Wippler and Michael Jesse, Benton County Attorney. Piccolo was informed that certain job functions had not been properly performed. Two incidents were specifically described at this meeting as being improper. Wippler told Piccolo that he could resign or a discharge proceeding would be brought against him. Jesse presented Piccolo with a resignation letter which read as follows:

Dear Sheriff Wippler:

I hereby resign my probationary appointment as Deputy Sheriff of the Benton County Sheriff's Department effective immediately.

I have discussed the basis for this resignation with you and the County Attorney. I understand that any and all reasons for this resignation shall remain non-public in my confidential file within the Benton County Sheriff's Department. It is my decision that my file remain confidential. In exchange for your agreement not to make those reasons public, I expressly waive my right to a hearing within 60 days as provided by the Minnesota Veteran's Preference Act. I further understand as a part of our agreement that you will not oppose my request for unemployment compensation. In addition, I also expressly waive all other legal remedies for reinstatement.

While I did not personally prepare this letter of resignation, I have carefully reviewed it, agree with its content and wish to abide by it completely. I have voluntarily signed this letter of resignation on my own accord and of my own free will. No promises or threats have been made or threatened in any way, to compel me to sign this letter.

I will voluntarily comply with all requirements of my resignation such as equipment issue return, etc., as directed by the union contract and the applicable provisions of the Benton County Personnel Policies.

Sincerely

Wade William Piccolo

Exhibit 1.

5. At this meeting, Jesse told Piccolo that, as Benton County Attorney, Jesse did not represent him. Jesse informed Piccolo that he had a right to a veterans preference hearing. Jesse stated that Piccolo could fight the discharge but that doing so could make obtaining other employment more difficult. Wippler told Piccolo that a voluntary resignation, without disclosure of the reasons for ending employment, would make Piccolo's chances of obtaining reemployment better.

6. Piccolo signed the resignation letter knowing he had a right to a hearing prior to being discharged. He was not coerced into signing the revocation letter. He felt somewhat rushed by Wippler and Jesse, but believed that the "deal" offered by Wippler was in the best interest of himself and his family, offered the best opportunity for securing subsequent employment, and was the best deal he could get from Wippler. Therefore, he decided to sign the letter immediately rather than consider it for a while or consult an attorney.

7. After the termination of his employment with Benton County, Piccolo applied for unemployment compensation benefits. As had been agreed, the County did not dispute Piccolo's claim and he received benefits from mid-August, 1993, to January, 1994. Piccolo received \$305 per week in unemployment benefits. Piccolo began employment with Sherburne County as a temporary, full-time jailer on February 8, 1994. He changed his position to that of regular, full-time dispatcher on April 10, 1994. In both positions, Piccolo earned \$10.70 per hour with no overtime and no benefits.

8. On February 4, 1994, Piccolo filed a Petition with the Commissioner of Veterans Affairs asserting that his rights under the Veterans Preference Act had been denied by Benton County. The Commissioner issued a Notice of Petition and Order for Hearing on March 4, 1994.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over the subject matter of this hearing, pursuant to Minn. Stat. 14.57 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Petitioner is an honorably discharged veteran and entitled to the protections of Minn. Stat. 197.46.

4. Petitioner was notified of his right to a hearing as required by Minn. Stat. 197.46 prior to being removed from his position as a Assistant County Sheriff. The letter of resignation presented to him by the County Attorney expressly referred to Petitioner's Veterans Preference rights.

5. Benton County did not violate Minn. Stat. 197.46 by offering Petitioner the option to resign his position or have discharge proceedings initiated against him.

6. Petitioner waived his rights under Minn. Stat. 197.46 by signing and delivering his resignation to Benton County after being informed of his rights in writing by the County.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner DISMISS the Petition of Wade Piccolo for relief under the Veterans Preference Act.

Dated this 23 day of May, 1994.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped (one tape).

MEMORANDUM

The Veterans Preference Act conditions removal of a veteran on either incompetence or misconduct. Minn. Stat. 197.46. A veteran may also be removed, without violating the Act, where the employer abolishes the veteran's position in good faith. State ex rel . Boyd v Mattson, 193 N. W. 30, 32 (Minn. 1923). To ensure that removals are done in accordance with the Veterans Preference Act, the veteran has a right to a hearing. Under Minn. Stat. 197.46, the employer must give the veteran notice of the right to request a hearing within 60 days.

Piccolo was given notice of his right to a hearing orally at the July 27, 1994 meeting and in writing in the resignation letter he was presented. He knew that by signing that letter he was surrendering his veterans preference rights.

As stated in Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987), "whether an employer has by its action removed a veteran is a matter of substance and not of form." Benton County gave Piccolo a clear choice at the meeting on July 27, 1993. Piccolo could resign, with any negative remarks about his employment with Benton County remaining confidential. Piccolo would also be allowed to file for unemployment compensation without objection by Benton County. In return, Piccolo would expressly waive any rights to proceed against Benton County, including any hearing right provided under the Veterans

Preference Act. The alternative Piccolo faced was the initiation of discharge proceedings, including a veterans preference hearing, if he requested one.

A veteran's hearing right can survive a resignation, but only where the resignation was obtained improperly. In Chase v. Indeppppppendent School District No. 31. 1993 WL 459883 (Minn.App. 1993), a veteran resigned after committing acts of misconduct. An advisory group and a supervisor suggested that it would be in everyone's best interest if the veteran resigned. In its decision, the Court of Appeals stated:

In any event, there is no evidence that Chase left his job because of good cause attributable to the District. Good cause will not be attributed to an employer if the employee's reason for quitting is unreasonable. Shanahan v. District Memorial Hosp,, 495 N.W.2d 894, 897 (Minn.App. 1993). Chase testified that he believed that he would be terminated if he did not resign. This was arguably a reasonable belief, although Chase resigned before District officials took any steps toward firing him. More importantly, Chase testified that he resigned because he did not believe that he would receive the procedural rights to which he was entitled if he chose to contest the potential termination. Nothing in the record shows reasonable grounds for this belief.

Chase, 1993 WL 459883.

In Chase, the veteran resigned before a decision to discharge was made by the employer. In this case, Wippler had decided that he would seek to remove Piccolo from his position. Wippler offered Piccolo the choice of resigning or have removal proceedings instituted and expressly informed Piccolo of his right to a hearing. Neither Wippler nor Jesse suggested that Piccolo would fail to receive a fair hearing. The resignation letter goes into great detail about piccolo's rights and he understood he was waiving those rights.

piccolo's testimony at the hearing suggests that he has reconsidered the wisdom of resigning from the Deputy Sheriff position he held with Benton County. It may be that insufficient grounds existed to support removal of Piccolo from that position. This does not change the fact that he made a knowing, intelligent, and voluntary choice to resign that position in exchange for certain actions by Benton County. That these actions were valuable to Piccolo was demonstrated when he asserted the confidentiality provision in the resignation letter at the hearing to preclude introduction of evidence concerning his job performance.

From a policy point of view, it appears that the Sheriff and the County Attorney went about this matter in an entirely appropriate, fair and reasonable manner. Having decided to discharge Piccolo, they informed him of

the reasons and his rights and gave him reasonable options. They did what Minn. Stat. 197.46 requires.

There is no evidence that Piccolo's hearing right was denied or would have been prejudiced by Benton County. Piccolo was notified of the rights entitled to him under the Veterans Preference Act and he voluntarily chose to waive those rights. Piccolo's Petition should be DISMISSED.

S.M.M.